SUPREME COURT, U. S.

Supreme Court, U.S.
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In the Supreme Court
of the United States

OCTOBER TERM 1971

No. 71-612

KURT VON POPPENHEIM,

Petitioner,

v.

PORTLAND BOXING & WRESTLING COMMISSION; JACK BATTALIA, NICK SCKAVONE, JOHN D. WELCH, EDWIN FITZPATRICK & ARNOLD C. HARRIS, individually and as members of the Portland Boxing & Wrestling Commission;

NATIONAL WRESTLING ALLIANCE, an Iowa Membership Corporation; DON OWEN, individually and as resident agent-member of the National Wrestling Alliance;

MOUNT HOOD RADIO & TELEVISION BROADCASTING CORPORATION, a Delaware corporation, NATIONAL WRESTLING ASSOCIATION OF AMERICA, INCORPORATED, and DON OWEN SPORTS, INC., an Oregon corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Judge, United States District Court for Oregon is unreported but is set

forth in the petition as Apx. B at p. 82. The opinion of the Court of Appeals is reported at 443 F.2d 1047 and is set forth in the petition as Apx. C at p. 85.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

The propriety of the dismissal of an action pursuant to the provisions of F.R.C.P. 41(b) when the plaintiff over a long period of time failed to comply with the order of the District Court to file a statement regarding witnesses and their expected testimony. The order for the statement was entered after discovery procedure failed. Should issues not decided by the Court of Appeals be considered by this Court?

RULE INVOLVED

F.R.C.P. 41(b).

STATEMENT OF THE CASE

The 14-page original Complaint in the case alleging, in very general and broad terms, the existence of a conspiracy and monopoly by the defendants, was filed on February 4, 1966.

After prompt answers by the defendants, each of them launched upon rather vigorous discovery procedures in an effort to learn the real issues in the case

and what real contentions would have to be met. After extensive discovery procedure and 14 months after the case was filed, defendants were frustrated in attempting to learn any facts on which the alleged monopoly and conspiracy were based. After being informed of the circumstances and making his own investigation of the posture of the case, the trial judge issued the following order:

> "I want a statement of what the conspiracy or conspiracies consist, with specificity, I should add.
>
> "Secondly, the names of the witnesses who will give you information concerning the existence of a conspiracy.
>
> "And, thirdly, the testimony you believe these witnesses will give.
>
> "With reference to Point Number 1, I think you should set out the parties to the conspiracy and the role which each of these parties played. * * *"

The statement was due to be filed by the plaintiff in 60 days. Nearly 90 days later, and after a reminder from counsel for a defendant, counsel for plaintiff wrote a letter to the one counsel for defendant setting forth the names of the defendants and describing their general business activities. Five months later (December, 1967) when plaintiff had done nothing further to comply with the order, defendants moved for involuntary dismissal under the provisions of F.R.C.P. 41(b), 28 U.S.C. 41.

Subsequent to the filing of and argument on the

motion, plaintiff was again given opportunity to and did file two more statements, the last one on March 11, 1968.

The trial judge then took the motion and the entire case under advisement. About six months later, on September 16, 1968, the motion for involuntary dismissal was allowed and the case was dismissed.

An appeal to the United States Court of Appeals for the Ninth Circuit was taken. That Court confined itself to the only issue that could be raised at that time (dismissal under Rule 41 (b)), notwithstanding the brief of plaintiff was devoted in large part to argument on the merits of the allegations in the Complaint.

On May 17, 1971, the Court of Appeals issued its opinion affirming the decision of the District Court in dismissing the case pursuant to Rule 41 (b) on the grounds that plaintiff had not complied with the order of the District Court. The Court of Appeals found that the dismissal was not an abuse of discretion, but rather that such dismissal was clearly warranted under the circumstances of the case.

ARGUMENT

United States Supreme Court Rules, Rule 19, states that a review on writ of certiorari will be granted only where there are special and important reasons therefor. While recognizing they are not controlling of the discretion to be exercised, the rule does indicate the character of reasons which will be con-

sidered in exercising that judicial discretion. A review of the petition in comparison to the character of the reasons for which certiorari will be granted is as follows:

Petitioner at pp. 16 and 22 of the petition cites *Von Poppenheim* v. *Portland Boxing and Wrestling Commission*, 241 Or 603, 407 P2d 853, but he does not anywhere in the petition assert the opinion by a state court decided a federal question. At any rate, the Oregon case was decided in November, 1965, and an attack on that case is not now timely.

There is no assertion in the petition that the decision of the United States Court of Appeals for the Ninth Circuit is in conflict with the decision of another Court of Appeals, nor is there an assertion there was an important state or territorial question decided in conflict with state or territorial law, unless it can be said the petition is claiming the six-years-old state case adverted to above is such a conflict; but that was a state decision.

The petition does not claim the questions of law decided by the Court of Appeals in this case have not been settled by this Court. Those questions have, in fact, been spoken to by this Court, see *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962). And there is no assertion the decision of the court below is in conflict with decisions of this Court. There is no claim there is a need for this Court to exercise supervision over the lower courts involved.

Most of the petition is devoted to pages and pages

of rehashing the contents of the jumbled original Complaint calling the defendants monopolists and conspirators. This is all conjecture or a figment of the imagination of petitioner, as there is no evidence in the case, after more than a year of discovery procedures of any monopoly or conspiracy. There are a number of false statements contained in the argumentative "STATEMENT OF THE CASE" and in the argument in support of the "REASONS FOR GRANTING THE WRIT." Without going into detail, suffice it to say much of the material of Apx. E is lifted from context but replete with misleading innuendos.

Throughout the petition there runs the thought the statement of witnesses and expected testimony ordered by the District Court on April 24, 1967, had to satisfy the defendants. This simply is not true. The Court originally set 60 days as the period of time for compliance, in other words the filing of the required statement. However, it was more than 11 months later that the final statement of plaintiff was filed and then the Court took the matter under advisement and studied the entire record for a period of six monhs before reaching a decision. It is absurd to say or imply the statement must necessarily have satisfied defendants.

Adverting to and including in the petition the consent decree of the United States District Court for the Southern District of Iowa, Central Division, is highly improper. Notwithstanding the impropriety, it must be assumed the Department of Justice would

take appropriate action under the provisions of the decree if any of the terms had been violated.

Petitioner's brief in support of his appeal to the Court of Appeals was similar to the petition herein in that it contains many pages calling the respondents monopolists and conspirators and speaking in broad, general terms about monopolies and conspiracies, and like the petition herein and the "statements" filed in the trial court, there were no specific dates mentioned, no people named or acts described of any actual person or persons in connection with any actual monopoly or conspiracy. The Court of Appeals, however, was able to glean two issues from the brief.

> "This appeal raises two issues: (1) Whether the letter and statements, taken singularly or together, did in fact constitute compliance with the court's order; (2) whether, notwithstanding noncompliance, the District Judge abused his discretion in dismissing the action with prejudice." See Petition Apx. C, p. 85 at p. 93.

The Court of Appeals found that the documents did not comply with the order of the trial court. The Court of Appeals also found that the sanctions of Rule 41 (b) to enforce a court order should only be invoked in extreme circumstances and upon a review of the entire record those circumstances were found to have existed in this case. See Petition Apx. C, pp. 99-100.

It is to be noted the petition is devoted almost in its entirety to argument on the merits of the allegations contained in the original Complaint, with some

little attention being given to constitutional questions and even less attention to the one issue that could be legitimately raised, dismissal of the case pursuant to the provisions of F.R.C.P. 41(b), 28 U.S.C. 41. The petition for certiorari is not the time nor place for argument of the merits of the case. U. S. Supreme Court Rule 23, 28 U.S.C. § 23. There is no mention in the petition of U. S. Supreme Court Rule 19, 28 U.S.C. § 19.

The U. S. Supreme Court will not generally grant certiorari to review questions not presented or passed on by the courts below. *Tyrell* v. *District of Columbia*, 243 U.S. 1 (1917); *Duignan* v. *United States*, 274 U.S. 195 (1927); *Husty* v. *United States*, 282 U.S. 694 (1931); *Lawn* v. *United States*, 355 U.S. 339 (1958); *California* v. *Taylor*, 353 U.S. 553 (1957); *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967); *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970).

The petition under the heading "QUESTIONS RESERVED FOR REVIEW" (p. 3) raises the question of whether or not a citizen can be denied his right to a hearing. The first heading, "Subsidiary Question Fairly Comprised" (p. 4) raises the question of city immunity from state and national constitutional restraints and antitrust laws; whether discovery may be denied a litigant in federal court; and whether or not the trial court could require the "statement" ordered by the trial court April 24, 1967. The second "Subsidiary Question Fairly Comprised" flatly states (without any reasoning whatsoever) the statement(s)

filed by plaintiff complied with the court order and whether under the circumstances of the case the District Judge could legally dismiss the suit.

It can readily be seen, even from a cursory reading of the Court of Appeals opinion, the questions reserved for review by the petition for writ of certiorari were not presented to nor passed upon by the court below.

CONCLUSION

The petition does not point out any conflict between the Court of Appeals decision and the decision of any other Court of Appeals. The decision of the Court of Appeals does not involve the decision of a state court in conflict with state law; does not raise an important question of federal law that should be settled; and does not conflict with the decisions of this court. The questions reserved by the petition for review have not been presented to or decided by the Court of Appeals. Therefore, the petition should be denied.

Respectfully submitted,

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